jr

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ART RICHMOND,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. 04-4140-JAR
UNNAMED DEFENDANTS,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM ORDER AND OPINION OF DISMISSAL

Plaintiff Art Richmond, proceeding pro se and *in forma pauperis*,[1] filed a form Civil Complaint on October 25, 2004 (Doc.1), which was mostly blank. Plaintiff failed to list or identify the defendant(s), failed to state any claims, failed to state the jurisdictional basis for this action, and failed to sign the form complaint. Attached to the complaint is a three page typewritten document on the letterhead, "TNT Graphics Plus of Minnesota, P.O. Box 76, Selden, KS. 67757....A Handicapped Business (I Am Blind)." This three page attachment further states:

> This complaint is about being denied any opportunity to give a computer price quote to the Selden City Council. The Mayor, Darrel, stated he absolute did not want any price from TNT Graphics... the council meeting was held in December of 2003...." This three page document then goes on to identify eight persons in a "...list of all peoples involved in this denial! All either are council members or clerk and county attorney.
>
> The eight persons are identified by name and telephone number, but there is no address

[1]Plaintiff's application (Doc. 3) to proceed *in forma pauperis* was granted in an Order (Doc. 5) entered on November 29, 2004.

identified for any of them. Although this "list" could be assumed to comprise the persons plaintiff intends to sue in this action, in plaintiff's application for appointment of counsel (Doc. 4), plaintiff again failed to list or identify any defendants in the caption. In his order granting plaintiff's application to proceed *in forma pauperis*, Magistrate Judge K. Gary Sebelius ordered plaintiff to forward to the Clerk of the Court, the exact address for each defendant, December 15, 2004. Plaintiff has failed to comply with this order. Both the identity and the address of the putative defendants is entirely unclear.

Also unclear are the claims and jurisdictional basis for the claims plaintiff brings in this action. In the form complaint, plaintiff left blank, those sections requiring a statement of his claims and their jurisdictional basis. Instead, in the three page attachment to the blank form civil complaint, plaintiff proffers eight "questions." Seven of these "questions" can be characterized as an expression of plaintiff's anger and frustration at: Congress for enacting unspecified federal laws; commercial banking practices; use of social security numbers; a person who works in maintenance for the City of Selden, Kansas; the inadequate cell phone coverage in Selden; and the chair of the FCC for forcing HDTV on television manufacturers and consumers. These seven "questions" do not constitute a statement of any claim.

The other "question" reads as follows:

> Question 7: Can a city a r tell me that they do not want a price on a computer, when they took 2 bids from other companies; I, as stated above am blind and do bidding on federal contracts as a "Federal Register Handicap Business; so how they, the city council, ", deprive me of the opportunity to give a price on a computer system? The mayor flat said we do not want a price from you!! I contacted the US Department of Justice, Division of Discrimination; they told me that the city of Selden did not have the right to not let me place a price on this computer system. I do have a letter from the Justice Department.

Another attachment to the form complaint is this referenced letter from the Department of

Justice. Rather than advising him that the city of Selden had no right to refuse to take a bid from him, this letter advises that the Americans with Disabilities Act of 1990 (ADA) protects individuals with disabilities from discrimination in the services programs and activities of state and local government entities and discrimination by most privately owned businesses. The author of the letter further advised plaintiff that the issue he raised "is a matter over which a local government entity has jurisdiction. . . (and does) . . . . not raise an issue that we are able to address." The author of the letter further suggested that plaintiff contact the "appropriate city office that would have the authority to handle the matter. . ."

To the extent that "Question 7" alleges discrimination on the basis of a disability, the complaint nevertheless fails to state a claim. Because plaintiff appears pro se, the court is mindful that plaintiff's pleadings are to be construed liberally and held to a less stringent standard than pleadings drafted by lawyers.[2] If a pro se plaintiff's complaint can reasonably be read "to state a valid claim on which the plaintiff could prevail, it [the court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements."[3] However, it is not "the proper function of the district court to assume the role of advocate for the pro se litigant."[4] For that reason, the court should not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues,"[5] nor should it "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on

---

[2]*Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)(citing *Haines v. Kerner*, 404 U.S. 519, 520-21 1972)).

[3]*Id.*

[4]*Id.*

[5]*Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991).

plaintiff's behalf."[6]

Even assuming plaintiff's complaint can be liberally construed to allege discrimination on the basis of a disability, the complaint fails to state a claim. Although plaintiff fails to state the jurisdictional basis for any such claim, to the extent he relies on the Americans with Disabilities Act ("ADA"),[7] he fails to state a claim under that statute. Title II of the ADA commands that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[8] A plaintiff must prove: 1) that he or she is a qualified individual with a disability; 2) that he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and 3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[9] Plaintiff's complaint fails to state that there was any nexus between his alleged disability and the alleged denial of an opportunity to bid on a city contract.

Plaintiff similarly fails to state a claim under any other statute. While 42 U.S.C. § 1983 does not itself create any substantive rights,[10] it grants an avenue of relief to a plaintiff who has been deprived of

---

[6] *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997).

[7] 42 U.S.C. § 12132.

[8] *Id.*

[9] *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999) (citations omitted).

[10] *Gallegos v. City and County of Denver*, 984 F.2d 358, 362 (10th Cir.), *cert. denied*, 508 U.S. 972 (1993).

an existing constitutional or federal statutory right by a person acting under color of state law.[11] But, this Court agrees with other jurisdictions that have held that a plaintiff cannot base a § 1983 claim on a federal statute that contains its own comprehensive remedial scheme, as does the ADA.[12]

For all of these reasons, the Court dismisses this action. In an *in forma pauperis* action such as this, 28 U.S.C. § 1915(e)(2) provides that the action shall be dismissed "at any time if the court determines that":

> (B) the action or appeal–
>
> (i) is frivolous or malicious;
> (ii) fails to state a claim on which relief may be granted; or
> (iii) seeks monetary relief against a defendant who is immune from such relief.[13]

"[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them."[14] However, the court may not dismiss an *in forma pauperis* complaint "simply because the court finds the plaintiff's allegations unlikely."[15] Generally, "a complaint is legally frivolous if it is based on an 'indisputably meritless legal theory' such as an 'infringement of a legal interest which

---

[11] *Id.*

[12] *See Houck v. City of Prairie Village*, 978 F. Supp. 1397, 1405 (D. Kan. 1997), *aff'd* 166 F. 3d 347 (10th Cir. 1998) (plaintiffs may not maintain a § 1983 action if the only alleged deprivation is of their rights under the ADA) (citing *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1531 (11th Cir. 1997)); *see also Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010-12 (8th Cir. 1999) (enforcement structure of Title II of ADA forecloses § 1983 claims).

[13] 28 U.S.C. § 1915(e)(2).

[14] *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

[15] *Id.*

clearly does not exist.'"[16]

This complaint is factually and legally frivolous for a number of reasons. The complaint is fundamentally infirm, for it fails to identify the name and address of the defendants, despite an order to do so by December 15, 2004. Moreover, if the attachment is accepted as plaintiff's complaint, it fails to state any claims. The so-called "questions" are largely plaintiff's rant against commercial practices, Congress, the FCC chairman, and various county or city officials for unspecified actionable conduct. At best, in question 7, plaintiff contends that he is a disabled person who was denied an opportunity to bid on a contract. But, his conclusory and incomplete allegations fail to state a claim the ADA or any other statute.

IT IS THEREFORE ORDERED BY THE COURT that this matter is **DISMISSED SUA SPONTE, WITHOUT PREJUDICE.**

IT IS SO ORDERED.

Dated this 25th day of January, 2005.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

[16] *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).